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MICHAEL RODAK, JR.

NO. 79-1733

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

W. D. R.,
Appellant,

VS.

TAYLOR COUNTY CHILD WELFARE UNIT,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF TEXAS

MOTION TO DISMISS OR AFFIRM

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W. D. R.,
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VS.

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Appellee

MOTION TO DISMISS OR AFFIRM

The Taylor County Child Welfare Unit, Appellee, moves the Court to dismiss the appeal filed herein or, in the alternative, to affirm the judgment of the Supreme Court of Texas on the ground that it is manifest that the question on which the decision of this cause depends is so insubstantial as to need no further argument.

I.

STATUTE INVOLVED

This appeal questions the validity of portions of Section 15.02 of the Texas Family Code. The statute governs termination of the parent-child relationship in the State of Texas. Section 15.02(1) sets forth eleven specific grounds which may be the basis of a suit to terminate the parent-child relationship. The court must find that at least one of these grounds exists in order to grant a petition requesting termination.

In the case at bar, termination was based on subsections (D) and (E) of Section 15.02(1), which read as follows:

> 15.02(1) the parent has
> (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
> (E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-

being of the child.

In addition to finding the existence of one or more of the grounds set forth in Section 15.02(1), the Texas statute requires the court to make an affirmative finding under Section 15.02(2), which reads as follows:

> 15.02(2) termination is in the best interest of the child.

II.

NATURE OF THE CASE

In July, 1978, the Taylor County Child Welfare Unit, Appellee herein, filed a Petition to Terminate the Parent-Child Relationship between Appellant and her four minor children. Following a jury trial in January, 1979, a decree was entered terminating Appellant's parental rights and appointing the Taylor County Child Welfare Unit managing conservator of the children.

The judgment of the trial court was affirmed by the Court of Civil Appeals, 11th Supreme Judicial District, at Eastland, Texas, on

October 4, 1979. The Supreme Court of Texas refused Appellant's Application for Writ of Error on January 23, 1980. Appellant's Motion for Rehearing was overruled on February 13, 1980.

Appellant then appealed to the Supreme Court of the United States pursuant to Title 28, U.S.C., Section 1257(2), maintaining that portions of Section 15.02 of the Texas Family Code are unconstitutionally vague and overbroad.

III.

ARGUMENT

Appellee contends that the question on appeal, i.e. the constitutionality of Section 15.02(1)(D) and (E) and 15.02(2) of the Texas Family Code, is so wanting in substance as to require no further argument to the Court. See Milheim v. Moffat Tunnel Improvement District, 262 U.S. 710, 716-17(1923); Ex parte Poresky, 290 U.S. 30,32(1933); and Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U.S. 388,397(1920).

A.
Section 15.02(2)

The major focus of Appellant's attack is the best interest standard set forth in Section 15.02(2). While Appellee agrees that standing alone and with no further interpretation this standard would be impermissibly vague and overbroad as the controlling standard in a suit to terminate parental rights, the best interest standard as used by the Texas courts functions as a protection for the parent against whom termination is sought.

Affirmative findings under both subsections of Section 15.02 are necessary to justify termination. Holley v. Adams, 544 S.W.2d 367, 370 (Tex. 1976); and Wiley v. Spratlin, 543 S.W. 2d 349, 351 (Tex. 1976). Section 15.02(1) sets forth specific behaviors which are sufficient grounds to justify termination. Section 15.02(2), containing the best interest standard, is an additional protection designed to preserve the family unit in cases in which special

circumstances mitigate or excuse the behaviors set forth in Section 15.02(1). It is not intended to proscribe specific conduct.

Further, a statute may be rescued from a finding of vagueness by state court decisions which set forth factors and criteria to be taken into account by the courts in making decisions under the statute. See Colten v. Kentucky, 407 U.S. 104 (1972). The best interest of the child standard has been elaborated upon by the Texas Supreme Court in the Holley case, supra, which lists nine factors the trial court should consider in determining the best interest of the child. The factors are:

(A) the desires of the child;
(B) the emotional and physical needs of the child now and in the future;
(C) the emotional and physical danger to the child now and in the future;
(D) the parental abilities of the individuals seeking custody;
(E) the programs available to assist these individuals to promote the best interest of the child;
(F) the plans for the child by the individuals or by the agency seeking custody;
(G) the stability of the home or proposed

placement;

(H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and

(I) any excuse for the acts or omissions of the parent.

Holley v. Adams, supra at 372.

B.
Section 15.02(1)

Appellant also attacks Section 15.02(1)(D) and (E) as being impermissibly vague and overbroad. A non-criminal statute is unconstitutionally vague under the due process clause of the Fifth or Fourteenth Amendments only when its language does not convey sufficiently definite warning as to the conduct proscribed, when measured by common understanding or practice. Arnett v. Kennedy, 416 U.S. 134, 158-64 (1974); and United States v. Cardiff, 344 U.S. 174, 176 (1952). Before it will be struck down, a statute must be so vague that men of common intelligence must guess at its application. Giaccio v. Pennsylvania, 382 U.S. 399 (1966); and Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

A finding of vagueness will result only where "the exaction of obedience to a rule or standard... is so vague and indefinite as really to be no rule or standard at all..." A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239 (1925). See also Broadick v. Oklahoma, 413 U.S. 601, 607-08 (1973); and Arnett v. Kennedy, supra at 159-60

The sections of the termination statute at issue in this case provide fair warning of the type of conduct which will justify termination of parental rights. Section 15.02(1)(D) covers situations where the parent neglects a child by exposing him to conditions or surroundings which endanger the child either physically or emotionally, while Section 15.02(E) contemplates aggressive behavior toward the child which results in physical or emotional abuse. Higgins v. Dallas County Child Welfare Unit, 544 S.W.2d 745, 749 (Tex. Civ. App.--Dallas 1976), no writ. It is true that the trier

of fact must determine on a case by case basis whether the specific conduct or conditions involved endanger a child, but it would be impossible for the statute to set forth each act or surrounding which constitutes a danger to children. As previously stated by this Court, the vagueness doctrine "is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing...statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." Colten v. Kentucky, 407 U.S. 104, 110 (1972).

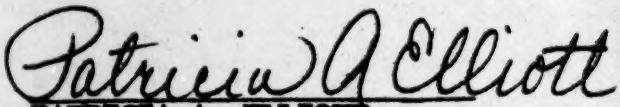
IV.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so insubstantial as not to need further argument and Appellee moves the Court to dismiss this appeal or, in the alternative, to affirm

the judgment of the Supreme Court of Texas.

Respectfully submitted,



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